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In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 199

JAMES E. JONES,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
and
RAILWAY EXPRESS AGENCY, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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OPINIONS BELOW.

The opinion of the District Court and the opinion of the Court of Appeals for the Sixth Circuit are attached to this brief as an Appendix.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Is there any rule stated in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035 (1891), determining whether an employee of the Railway Express Agency, Inc., or any other express company is afforded protection under the Federal Employers' Liability Act?

STATUTE INVOLVED.

The pertinent part of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) is set forth on page 4 of this brief.

COUNTERSTATEMENT OF FACTS.

Necessarily, the claim set forth by plaintiff in his complaint is based upon the Federal Employers Liability Act (45 U. S. C. A. Sec. 51). Any claim or cause of action which plaintiff may have had other than under the Employers Liability Act was barred at the commencement of this action both by the running of the Indiana statute of limitations (Burns' Indiana Statutes, Ann., 1933, Sec. 2-602; Hirschberg Affidavit, R. p. 19), and by the fact that plaintiff as an employee of the Railway Express Agency, applied for and received compensation benefits under the Indiana Workmen's Compensation Act (Burns' Indiana Statutes Ann., 1933, Sec. 40, 1206-1213; Hirschberg Affidavit, R. p. 19 & 20; Jake's Affidavit, R. p. 14).

Defendants did file a motion for summary judgment (R. 13), as stated in the petition (p. 5). After the hearing on the motion for summary judgment it was stipulated between and among the parties (R. 45) that a trial by jury was waived and that the trial and determination of all issues of law and fact in this case were submitted to Judge Freed for decision upon the answers to interrogatories, exhibits, affidavits, statements and records filed. Thereafter the following order was entered (R. 57):

> "This matter came on for hearing upon the pleadings, the evidence, the motion for summary judgment and the stipulation waiving a trial by jury and submitting the case to the court for trial and determination, and the court finds that plaintiff was an employee of the Railway Express Agency, Inc. and not an employee of the New York Central Railroad Company and finds that Railway Express Agency, Inc. is not a 'common car-

rier by railroad' and the Federal Employers Liability Act is not applicable.

It is ordered that judgment be and it is hereby entered in favor of both defendants and against the plaintiff together with the costs herein.

FREED, *District Judge.*"

It is apparent from the above that the trial court, as the trier of the facts, decided the cause upon its merits in favor of both defendants.

All of the evidence establishes that the plaintiff was hired and paid by the Railway Express Agency, Inc., and that company alone had the right to control plaintiff in the details of his work. Similarly, all of the evidence establishes that the New York Central Railroad Company alone operated all train equipment, including any railroad cars owned or leased by the Express Agency. There is no evidence establishing that the Express Agency operated 780 railroad cars or any railroad cars, as stated in petitioner's brief (page 18).

All of the evidence establishes that the Railway Express Agency, Inc., is a separate corporation having its own officers, directors and employees, maintaining its own office and keeping its own records. It is not a railroad company, does not *operate* any railroad facilities, and is not a freight forwarder, but is a common carrier using the facilities of various railroads, motor carriers, navigation companies and air lines and carrying on that business as its own.

ARGUMENT.

I. THE CASE WAS CORRECTLY DECIDED BY THE DISTRICT COURT AND BY THE COURT OF APPEALS.

A. The Railway Express Agency, Inc., is not a railroad and so is subject to the various State workmen's compensation acts, and not to the Federal Employers' Liability Act.

The Federal Employers Liability Act provides (45 U. S. C. A., Sec. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> * * * * *
>
> "Any employee of a carrier, any part of whose duties as such employee * * * shall, in any way * * * affect such commerce as above set forth shall, * * * be considered entitled to the benefits of this chapter."

The Railway Express Agency, Inc., is not a "common carrier by railroad," i.e., it is not a railroad company any more than is it a motor carrier, a navigation company, or an air line. The Federal Employers Liability Act was intended to apply and does apply only to railroads. It has at all times been so interpreted by the courts. To apply the act to other than railroads would be to disregard the clear language of 45 U. S. C. A., Sec. 51 "common carrier by railroad," "cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment," and similar language in subsequent sections of the Act obviously applicable to railroads alone.

The Railway Express Agency, Inc., is a common carrier and uses the facilities of railroads, motor carriers, navigation companies and air lines in conducting its express business. By such use as it makes of those facilities it obviously does not thereby become a railroad, motor carrier, navigation company or air line. It is under the jurisdiction of the Interstate Commerce Commission by virtue of an express provision in the Interstate Commerce Act (49 U. S. C. A. 1) as follows:

> (3)(a) "The term 'common carriers,' as used in this chapter shall include all pipeline companies; *express companies,* * * *."

In *Wells Fargo & Co. v. Oscar G. Taylor,* 254 U. S. 175; 65 L. Ed. 205 (1920), Taylor, an express messenger for Wells Fargo & Company, a common carrier by express, was injured when an express car in which he was working derailed. The express car was part of a passenger train of the St. Louis & San Francisco R. R. Company, against which railroad plaintiff obtained a judgment. Thereafter the express company brought its suit in equity against Taylor to enjoin enforcement of the judgment. The action was based upon the operating agreement between the express company and the railroad and a contract between Taylor and the express company providing that neither the express company nor the railroad should be liable for any injury received while on the railroad company's trains. The operating agreement provided that the railroad would furnish suitable cars for express and haul them in its passenger trains, together with express messengers. It further provided that the express company would make stated payments and assume all risk and damage to its employees. The District Court granted the injunction which was reversed by the Circuit Court on the ground that the express company was a "common carrier by railroad" within the meaning of the Federal Employers' Liability Act and that under Section 5 of the Act the messenger's agreement was

void. The U. S. Supreme Court reversed the Circuit Court and affirmed the granting of the injunction, holding that the Federal Employers' Liability Act did not apply. The Supreme Court said (65 L. Ed. 213):

> "In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad (see Southern P. Co. v. Jensen, 244 U. S. 205, 212, 213, 61 L. Ed. 1086, 1096, 1097, L. R. A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597); by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars, and other appliances intended to promote the safety of railroad employees (see San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 484, 60 L. ed. 1110, 1117, 36 Sup. Ct. Rep. 626); by the use of similar words in closely related acts which apply only to carriers operating railroads (March 2, 1893, 27 Stat. at L. 531, chap. 196, Comp. Stat. Sec. 8605, 8 Fed. Stat. Anno. 2d ed. p. 1155; May 30, 1908, 35 Stat. at L. 476, chap. 225, Comp. Stat. Sec. 8624, 8 Fed. Stat. Anno. 2d ed. p. 1199; May 6, 1910, 36 Stat. at L. 350, chap. 208, Comp. Stat. Sec. 8642, 8 Fed. Stat. Anno. 2d ed. p. 1420); and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads, but not express companies doing business as here shown (1 Inters. Com. Rep. 677, 1 I. C. C. Rep. 349; United States v. Morsman, 3 Inters. Com. Rep. 112, 42 Fed. 448; Southern Indiana Exp. Co. v. United States Exp. Co., 88 Fed. 659, 662, s.c. 35 C. C. A. 172, 92 Fed. 1022. And see American Exp. Co. v. United States, 212 U. S. 522, 531, 534, 53 L. ed. 635, 639, 640; 29 Sup. Ct. Rep. 315).

As Taylor was not an employee of the railroad company, and the express company was not within the

Employers' Liability Act, it follows that the act has no bearing on the liability of either company, or on the validity of the messenger's agreement."

In *United States Ex Rel. Chicago, N. Y. & Boston Refrigerator Co. v. Interstate Commerce Commission,* 265 U. S. 292; 68 L. Ed. 1024 (1924), the plaintiff in error applied to the Interstate Commerce Commission for a certificate as provided for in Section 209(c) of the Transportation Act. The Commission refused the certificate and a mandamus action was then filed. The Supreme Court, in affirming the dismissal of the petition in the mandamus action said (p. 294):

> "The single question presented is whether the Car Company is a 'carrier by railroad'."

And further (p. 295):

> "In Wells, F. & Co. v. Taylor * * * this court defined the words 'common carrier by railroad,' as used in the Employers Liability Act * * * to mean 'one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.' If this definition be applied here, it disposes of the question against the contention of the Car Company, since it is plain that it does not operate a railroad,—that is, it is not a railroad company acting as a common carrier."

Admittedly there are some dissimilarities between the *Wells Fargo* case and the instant case, or between the Wells Fargo Company and the Railway Express Agency, as pointed out in petitioner's brief. That said dissimilarities are not a basis for distinguishing the *Wells Fargo* case seems clear. The crux of the *Wells Fargo* decision is stated by the court in the following language (254 U. S. 187):

> "and so the question is presented whether the Act embraces a common carrier by express, which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown."

See also *Ellis v. Interstate Commerce Commission,* 237 U. S. 434; 59 L. Ed. 1036 (1915); *Southeastern Express Co. v. American Rwy. Express Co.,* 265 U. S. 426; 68 L. Ed. 1087 (1923); *U. S. v. Fruit Growers Express Co.,* 279 U. S. 363; 73 L. Ed. 739 (1929); *Gaulden v. Southern Pacific Co.,* 78 Fed. Supp. 651 (1948); *Higgins v. Erie Railroad Company,* 89 N. J. Law 629; 99 Atl. 98; *State Ex Rel. Great Northern Express Co. v. District Court,* 142 Minn. 410; 172 N. W. 310.

The Federal Employers Liability Act was amended in 1939. However, in that amendment there was no change made in the description of the employer liable under the Act. Prior to this 1939 amendment several statutes were enacted by Congress concerning the social security of employees engaged in interstate commerce. In every one of these statutes Congress recognize the distinction between a common carrier by railroad and an express company. See the Railway Labor Act, 45 U. S. C. A., Sec. 151; the Railroad Retirement Act, 45 U. S. C. A. 228(a) and 228(m); the Railroad Unemployment Insurance Act, 45 U. S. C. A., Sec. 351(a), and (b); the Carriers Taxing Act, 45 U. S. C. A., Sec. 261(a) and (i); the Railroad Retirement Taxing Act, 26 U. S. C. A., Sec 1532(a) and (h).

We find nothing in the various proceedings before the Interstate Commerce Commission referred to in petitioner's brief, pages 30 and 31, to support the proposition that the Express Agency is subject to the Employers Liability Act. It is not disputed that the Express Agency, as its name implies, is the agency designated by the railroads to handle express business. It does not follow and there is no basis in the evidence for arguing that the Express Agency is the agent of any of the railroads, motor carrier companies, navigation companies or air lines whose facilities it uses in the sense that said companies have the right to control the Express Agency in the details of

its work. The Express Agency is not the alter ego of New York Central Railroad Company or of any of the railroads over which it handles express shipments. *Gaulden v. So. Pac. Co., supra.*

The case of *Aetna Ins. Co. v. Railway Express Agency, et al.*, 80 O. App. 30; 48 O. L. A. 342 (1947), referred to in petitioner's brief (p. 32), held that a clause in the Express Agency's Uniform Express Receipt wherein the shipper agreed that the value of the shipment was a stated sum was applicable as against the railroad company as well as the Railway Express Agency. The decision of the court was predicated upon the agreement by the shipper in the express receipt that its terms should apply to "all carriers handling this shipment" and the court concluded that the railroad was one of the carriers handling the shipment.

B. There is no "essential identity" between the railroads and the Railway Express Agency, Inc., which is a separate, independent corporation whose employees are its employees alone.

As already pointed out, the Railway Express Agency, Inc., is a separate, independent corporate entity maintaining its own separate offices and having its own directors, officers and employees. It is not a subsidiary of The New York Central Railroad Company which owns but 96 of the 1,000 shares of outstanding stock. Its business consists of transporting express shipments on trains of the various railroads, on trucks of various motor carrier companies, on boats of various navigation companies, and on planes of various airline companies. For the purpose of obtaining these transportation facilities it enters into a standard contract, and entered into the Express Operations Agreement (Ex. B, Appendix II, Petitioner's brief p. 51) with 756 railroads throughout the country, including the defendant, The New York Central Railroad Company. By

the terms of that agreement the railroad company grants to the Express Company the privilege of hauling express on the railroad's trains and agrees to furnish express cars and transport them on passenger, mail and express trains, together with such express company messengers, helpers and cars as are necessary to handle the express. It is further provided that the railroad company shall get 85 per cent of the carload gross revenue accruing on its line and its ratable share of the "railroad transportation revenue" as that is defined, as payment for the transportation services of the railroad in hauling said express.

There is nothing in the Express Operations Agreement or in the relationship between the Railway Express Agency, Inc., and the railroads which destroys the separate corporate identity of the Railway Express Agency, and there is no "essential identity" between the defendants herein as argued in petitioner's brief. (pp. 26 *et seq.*) The proceedings before the Interstate Commerce Commission and the provision in the Operations Agreement pertaining to tariffs do not establish any "essential identity." The same are understandable in the light of the provisions in the Operations Agreement that the railroads shall get 85 per cent of the carload gross revenue accruing on their lines and their ratable share of the "railroad transportation revenue" as payment for the transportation services furnished by them. (See 227 I. C. C. 517; 150 I. C. C. 423, *approving and authorizing the Express Operations Agreement.*)

Plaintiff was in the sole employ of the Railway Express Agency, Inc., and was not an employee of the New York Central Railroad or any other railroad, motor carrier, navigation company or air line. His duties did not include any railroad work but consisted solely of handling express business for the Railway Express Agency, Inc., which company alone paid him for all of his services and controlled him in the details of his work. His duties did not require

him to handle any of the railroad's baggage, freight or U. S. mail business nor did they require him to participate in train operation. It is true that the Operations Agreement requires that employees of the Express Agency shall conform to the rules of the railroad *while on the premises or lines of the railroad company* (Article XIII) and upon the written request of the railroad company an objectionable employee of the Express Agency shall be discharged by the latter. This obviously does not grant to the railroad any right to control the employees of the Express Agency in the details of *their work* but is contained in the Operations Agreement for the purpose of safety and to permit the railroad's performance of its function as a carrier. In other words, express employees are obligated to obey railroad rules while on railroad trains or railroad property just as are passengers required to obey railroad rules.

There is no analogy between the relationship of the Railway Express Agency to the railroads and the supposititious case advanced in petitioner's brief (page 41) where a railroad incorporates separately each 10-mile section of its line. Railroads continue to furnish passenger and freight service as they are obligated to do. These are non-delegable duties enjoined upon the railroads, as was held in *Wilson v. Terminal Railroad Association,* 77 N. E. (2d) 429 (Illinois, 1948); *Kansas City & Southern Railway Co. v. Nectaux,* 26 F. (2d) 317 (5th Circuit, 1928) and *North Carolina Railroad v. Zachary,* 232 U. S. 248; 58 L. Ed. 591 (1913) discussed in petitioner's brief (page 47). There is nothing in the Interstate Commerce Act or elsewhere requiring railroads to furnish express service, as distinguished from or in addition to the carrying of freight and passengers as a common carrier.

In an annotation in 47 *L. R. A.* (N. S.) 64 it is stated:

"Express messengers are not employees of the railroad so as to be within the protection of the Federal

> statute where they are employed by the express company, and their connection with the railroad, such as handling baggage, etc., is merely incidental to their employment by the express company."

The annotator cites as authority for his statement *Missouri, Kansas & Texas Railway Co. v. West,* 134 Pac. 655 (Okla., 1913) and *Missouri, Kansas & Texas Ry. Co. of Texas v. Blalack,* 147 S. W. 559 (Texas, 1912), in both of which cases an express messenger of the American Express Company was held not to be an employee of the railroad on whose train he was riding.

In *Robinson v. The B. & O. Railroad,* 237 U. S. 84; 59 L. Ed. 849 (1914), a Pullman porter sought to recover under the Federal Employers Liability Act for personal injuries sustained. The court held that Pullman porters are not railroad employees even though they serve the passengers, saying (pp. 92 & 93):

> "We think it to be clear that in employing its servants the Pullman Company did not act as the agent of the railroad company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company."

In *Chicago, R. I. & P. Railroad v. Bond,* 240 U. S. 449; 60 L. Ed. 735 (1916), a wrongful death action was brought under the Federal Employers Liability Act. The court held that one who as an independent contractor agrees to handle coal and ashes for railroad engines and gets instructions from the yardmaster is not a railroad employee.

Petitioner relies upon the case of *Erie Railroad Company v. Margue,* 23 F. (2d) 664 (6th Circuit, 1928) (Petitioner's brief, p. 38). That case merely holds that maintenance of the tracks, roadbed and structures of a railroad

company is a non-delegable duty, liability for which the railroad cannot escape by delegation to an independent contractor. The court said (p. 665):

> "that responsibility is quite a different thing from the * * * performance of a special service, such as express and sleeping car companies perform, and which the railroad itself is not legally bound to perform. The maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights."

The case of *Cimorelli v. New York Central Railroad Company,* 148 F. (2d) 575 (6th Circuit, 1945) is relied upon by the petitioner as are the cases of *Pennsylvania Railroad Co. v. Roth,* 163 Fed. (2d) 161 (6th Circuit, 1947) and *Pennsylvania Railroad Co. v. Barlion,* 172 F. (2d) 710 (6th Circuit, 1949) (Petitioner's brief, p. 38). In these cases the facts are totally different than those in the instant case and the court concluded that the defendant railroad had the right to control the employee in the details of his work, and therefore he was not in fact in the employ of an independent contractor.

II. THERE IS NO CONFLICT OF DECISIONS.

It is contended by the petitioner that the decision of the Court of Appeals is in conflict with the principle of law enunciated in *Pacific Express Co. v. Seibert,* 142 U. S. 339; 35 L. Ed. 1035 (1891), and numerous other decisions by this Court (none of which "other decisions" are identified). This Court announced no principle of law and said absolutely nothing in the *Seibert* case in any way applicable to this case. It held only that a Missouri tax statute applicable to express companies was valid and did not interfere with interstate commerce or violate constitutional provisions requiring equality and uniformity of taxation. The language of the trial court in the *Seibert* case, which petitioner relies upon (Petitioner's brief, pp. 2, 7, 10, 11, 12, 17 & 18) has no bearing whatsoever upon the question here involved. It is obvious that there is no

conflict of decisions in this case. Accordingly the petition should be denied since the only question presented in it is whether a rule stated in the *Seibert* case, rather than *Wells Fargo v. Taylor,* 245 U. S. 175; 65 L. Ed. 205 (1920), determines whether an employee of the Railway Express Agency is afforded the protection of the Federal Employers' Liability Act.

III. THE QUESTION INVOLVED IS NOT OF GENERAL IMPORTANCE.

Petitioner argues that thousands of "railroad workers" are being denied the protection of the Federal Employers' Liability Act because of this Court's decision in the case of *Wells Fargo v. Taylor, supra.* Obviously there are railroad workers who are not employed by a railroad or are not engaged in interstate commerce and so are not covered by the terms of the Federal Employers' Liability Act (Pullman porters, express messengers, independent contractors and intrastate employees). That follows from the fact that Congress has seen fit to limit the Act to common carriers by railroad.

Employees of the Railway Express Agency, Inc., are entitled to the benefits of the various State compensation acts under which the Railway Express Agency, Inc., has qualified, and petitioner, as an employee of the Railway Express Agency, Inc., has already recovered under the Indiana Workmen's Compensation Act. Petitioner, like other Railway Express employees, was not required to gamble on his ability to prove negligence in order to recover the benefits provided by the Compensation Act.

There is not here involved any dispute as to whether petitioner has a remedy for his injuries but only whether his right of recovery is under the State Compensation Act or the Federal Employers' Liability Act. That question is clearly answered both by Congress and by this Court. There is no more question as to whether the Federal Em-

ployers' Liability Act applies to the Railway Express Agency, Inc., than there is as to whether its employees are somehow employees of the New York Central Railroad Company and all of the other railroads in the country.

CONCLUSION.

Petitioner, as an employee of the Railway Express Agency, Inc., properly recovered benefits under the Indiana Workmen's Compensation Act.

The Railway Express Agency, Inc., is a separate, independent corporate entity operating as an express company. It is not a railroad and is not governed by the Federal Employers' Liability Act. As was pointed out in *Erie Railroad Co. v. Margue, supra,* the service performed by the Express Agency is a special service which a railroad company is not legally bound to perform. Historically, this service has been delegated by the railroads of this country as is indicated by the opinions of the Interstate Commerce Commission in *Consolidation of Express Companies,* 59 I. C. C. 459; *Railway Express Agency, Inc., Securities and Control,* 150 I. C. C. 423, and *Railway Express Agency, Inc., Pooling Application,* 227 I. C. C. 517. There is nothing in the record in this case showing that the railroads have any right to control the Express Agency or its employees in the details of their work. Clearly the petitioner was an employee of the Railway Express Agency, Inc., alone and, therefore, not subject to the Federal Employers' Liability Act.

Respectfully submitted,

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APPENDIX.

Memorandum Opinion.

(Filed August 9, 1949.)

FREED, *J.*:

There is no genuine issue raised as to any material fact. The plaintiff, an express messenger for Railway Express Agency, Inc., on duty aboard an express car forming part of a New York Central Railroad Co. train enroute from Cleveland to St. Louis, sustained injuries when he was struck by a Railway Express Agency truck as he was remounting the car at Terre Haute, Indiana. He brings suit under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, and the defendants, after answer, move for summary judgment.

At the hearing on the motion, defendants contended that an award of payments under the Indiana Workmen's Compensation Act was a bar to the present proceedings. *Chicago, R. I. & P. R. Co. v. Schendel,* 270 U. S. 611; *Landreth v. Wabash R. Co.,* 153 F. (2d) 98, cert. den. 328 U. S. 855. Cf. *Hoffman v. New York, N. H. & H. R. Co.,* 74 F. (2d) 227, cert. den. 294 U. S. 715. There is nothing before the Court to indicate the nature of the tribunal or the proceedings or the form of the award under which payments were made. However that may be, it is apparent further in this memorandum, that there is no occasion to decide this question.

Plaintiff contends that he is entitled to the benefits of the Federal Employers' Liability Act since Railway Express Agency, Inc., is a "common carrier by railroad" within the meaning of that Act by virtue of its structure and function and/or the broadened scope of the Act. If that is not true, then plaintiff maintains that the relationship between the two defendants, Railway Express and the New York Central Railroad, is some sort of agency or partnership, so that the plaintiff may be said to be an employee

of the Railroad and, as such, entitled to the benefits of the Act.

In respect of the first contention, whatever this Court's views might be were it presented for the first time, this Court is obliged to followed the precedent, established by the Supreme Court in *Wells-Fargo & Co. v. Taylor,* 254 U. S. 175, that an express company is not within the purview of the Federal Employers' Liability Act.

While counsel for plaintiff has, most instructively, illuminated the interrelationship of the railroads and the Railway Express Agency, Inc., not enough has been shown to by-pass the *Wells-Fargo* decision. The 1939 amendment to the Act opposes rather than aids plaintiff's contention; for Congress in broadening the coverage of the Act did not legislatively override the *Wells-Fargo* decision by specific wording, a step it did not hesitate to take in overruling a similar early construction of the Interstate Commerce Act.

Again, as to the second contention, plaintiff has not shown that the *Wells-Fargo* decision, *supra,* in which the same argument was made, is any the less controlling. See also: *Robinson v. Baltimore & Ohio R. R. Co.,* 237 U. S. 84. Even were this not true, this Court would be reluctant to point the way into the labyrinth of confusion that would result from what would essentially be a holding that every employee of Railway Express Agency, Inc., was also an employee of every railroad that had signed the agreement with Railway Express. It will suffice to say for the purpose of this decision that plaintiff was an employee of Railway Express Agency, Inc. and not an employee of New York Central Railroad.

Pursuant to an agreement reached at the time of the hearing on the motion for summary judgment the parties have stipulated that the Court might, if the issues discussed above were resolved in favor of plaintiff, make findings of fact on the issues of negligence and the extent of damages

on the basis of the record as it now exists. Since the decision is adverse to plaintiff, no findings on these issues has been made.

Motions of both defendants for summary judgment are granted.

FREED,
United States District Judge.

August 9, 1949.

Opinion of the Circuit Court.

Filed June 1, 1950.

No. 11039

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES E. JONES,

Appellant,

v.

NEW YORK CENTRAL RAILROAD COMPANY and RAILWAY EXPRESS AGENCY, INC.,

Appellee.

APPEAL from the District Court of the United States for the Northern District of Ohio, Eastern Division.

Decided June 1, 1950.

Before HICKS, Chief Judge; SIMONS and MILLER, Circuit Judges.

HICKS, Chief Judge. The gist of the complaint in this case is, that appellant, plaintiff below, an express messenger for appellee, Railway Express Agency, Inc. (herein called Express Agency), while on duty on an express car forming part of a New York Central Railroad Company train, en route from Cleveland to St. Louis, sustained injuries when struck by an Express Agency truck as he was re-mounting the car at Terre Haute, Indiana. He brought suit under the Employers Liability Act, 45 USC, Sec. 51, et seq. The case was tried to the court without the intervention of a jury and upon a stipulation of facts. Because of this stipulation the court concluded that there was no genuine issue raised as to any material facts, and obviously for this reason it did not make findings in accordance with Rule 52, Rules of Civil Procedure, as such findings were not required. See *Lucking v. Delano,* 122 Fed. (2d) 22 (C. A.

of D. C.); *Thomas v. Peyser,* 118 Fed. (2d) 369, 374 (C. A. of D. C.).

The parties are in agreement upon the questions here involved, i. e.,—

First, is the Express Agency a common carrier by railroad so as to be liable to its employees under the Employers Liability Act?

Second, when an employee of the Express Agency is injured while working on a railroad train, is he entitled to the benefits of the Act as an employee of that railroad?

The court answered both questions in the negative. It found in its memorandum opinion and in the judgment that appellee, the Express Agency, is not a "common carrier by railroad" and that therefore the Act is not applicable. It further found that appellant Jones was an employee of the Express Agency and not an employee of appellee Railroad Company.

We think the court was correct in both instances. The Federal Employers Liability Act, supra, provides:

> "Every *common carrier by railroad* while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . ." (Italics ours.)

In *Wells Fargo & Co. v. Taylor,* 254 U. S., 175, 187, the court said:

> "In our opinion the words 'common carrier by railroad' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention

of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 212-213); by the obvious reference in the latter part of §§ 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co. v. Wagner,* 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads *but not express companies doing business as here shown.* 1 I. C. C. 349; *United States v. Morsman,* 42 Fed. Rep. 448; *Southern Indiana Express Co. v. United States Express Co.,* 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co. v. United States,* 212 U. S. 522, 531, 534."

See also *Chicago Refrig. Co. v. Interstate Commerce Comm'n.,* 265 U. S. 292.

The *Wells Fargo* case was not a suit for damages but it did announce an interpretation of the Act upon the question here involved. We find nothing in the record sufficient to differentiate the Express Agency from Wells Fargo & Company or to place it in a separate category. It was a New Jersey corporation organized to carry the express transportation business of various railroad companies and other carriers. It is undoubtedly true that the Express Agency is a common carrier and as such is subject to all the duties and responsibilities of a common carrier at common law but it is not a common carrier by railroad. The Act was passed in 1908 and the *Wells Fargo* case was decided in 1919. The Act was amended in 1939 but no effort was then made to include express companies within its terms. We are therefore justified in concluding that the *Wells Fargo* case had legislative approval. *United States v. Elgin J. & E. Ry.,* 298 U. S. 492, 500.

The answer to the second question is found in *Robinson v. Baltimore & Ohio RR Co.*, 237 U. S. 84, 94, in which the court said:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

The appellant, Robinson, had brought suit under the Act for damages alleged to have been received by him while on appellee's train as a porter, employed by the Pullman Company. To treat Jones, a messenger for the Express Agency, as an employee of appellee Railroad Company, which did not employ him, would be in effect to disregard the separate legal entity of that corporation. There is no showing of special circumstances to justify such a result.

In *Gaulden v. Southern Pacific Co.*, 78 Fed. Supp., 651, 656, it was held that a contract between railroads and a refrigerator company for servicing refrigerator cars rented to railroads did not make the railroads employers of the refrigerator company's employee so as to subject the railroad company to suit by Gaulden, the employee, under the Act. The case was affirmed by the Court of Appeals of the Ninth Circuit [174 Fed. (2d) 1022] upon the grounds and for the reasons stated in the opinion of the trial court.

In *M. K. & T. Ry. Co. v. Blalack, et al.*, 105 Texas 296, it was held that an express messenger whose duty it was to accompany and care for express matter on the train of a railroad company was not an employee of the railway company. This was held on the authority of *Gulf C. & S. F. Ry. Co. v. Wilson*, 79 Texas 375.

The judgment appealed from is affirmed.